OAH Docket No. 9-1700-10242-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN RIGHTS

Valerie Hovland,

Petitioner,

v.

ORDER ON MOTION TO DISMISS

Metropolitan Council - Waste Water Commission,

Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge on Respondent's motion to dismiss. Respondent filed this motion on February 21, 1996. Petitioner filed a memorandum in opposition to the motion on March 6, 1996. Respondent filed a reply memorandum on March 13, 1996. The record closed on March 13, 1996.

Andrew D. Parker, Esq., 808 Colwell Building, 123 North Third Street, Minneapolis, Minnesota, 55401, represented the Respondent.

Jesse Gant, III, Esq., 915 Grain Exchange Building, 400 South Fourth Street, Minneapolis, Minnesota, 55415-1484 represented the Petitioner.

Based upon the Memoranda filed by the parties, all the filings in this case, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED:

1. That Respondent's motion to dismiss Petitioner's claims of sexual harassment involving incidents occurring prior to January 23, 1994 is GRANTED.

2. That Respondent's motion to dismiss Petitioner's claim of sexual harassment based on the January 23, 1994 incident is DENIED.

3. That Respondent's motion to dismiss Petitioner's reprisal claim for failure to state a claim upon which relief can be granted is DENIED.

Dated this ____ day of April, 1996

PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Petitioner, Valerie Hovland, began working for Respondent on February 21, 1978. Petitioner claims that between 1978 and 1990 she was subjected to several incidents of sexually offensive conduct by co-workers. In January of 1991, Petitioner filed an internal complaint concerning the incidents of sexually offensive conduct. On January 8, 1992, Petitioner was discharged for excessive absenteeism. Petitioner filed a grievance following her January 8, 1992 discharge. As a result of the grievance process, the parties agreed that if Petitioner received counseling and chemical dependency treatment, Petitioner could be reinstated.

On March 13, 1993, Petitioner was reinstated pursuant to a "Conditional Reinstatement Agreement". The Agreement required that Petitioner abstain from using alcohol or other mood altering substances, and that Petitioner submit to random drug testing. The Agreement further provided that Petitioner's failure to comply with its terms would result in her termination. Petitioner claims that on January 23, 1994, co-worker and shift manager Don Moore blew her a kiss during a meeting at work. On March 27, 1994, Petitioner filed an internal complaint of sexual harassment based on the alleged January 23rd incident. On April 29, 1994, Petitioner failed a random drug test by testing positive for cocaine. On May 6, 1994, Petitioner was discharged as a result of the drug test. On January 26, 1995, Petitioner filed a charge of discrimination with the Department of Human Rights alleging sexual harassment and reprisal.

Respondent has brought a motion to dismiss Petitioner's charge and complaint in its entirety. Minn. R. Civ. P. 12.03; Minn. Rule 1400.5500(K). Respondent argues that Petitioner's sexual harassment claims are time-barred by Minn. Stat. § 363.06, subd. 3, and that Petitioner's reprisal allegation fails to state a claim upon which relief can be granted because Petitioner has not established that she engaged in statutorily protected conduct.

Sexual Harassment Claims

Under the Minnesota Human Rights Act ("Act"), a charge of discrimination must be filed with the Commissioner of the Department of Human Rights within one year after the occurrence of the practice. Minn. Stat. § 363.06, subd. 3. Petitioner's last allegation of sexually offensive conduct occurred on January 23, 1994. Petitioner filed her charge with the Department of Human Rights on January 26, 1995. Respondent maintains that because Petitioner filed her charge more than one year after the last alleged incident, all of Petitioner's sexual harassment claims should be dismissed as untimely.

Petitioner argues that, pursuant to Minn. Stat. § 363.06, subd. 3, the running of the one-year limitation period was tolled by her filing a written internal complaint concerning the January 23, 1994 incident with Respondent's Equal Opportunity division. Minn. Stat. § 363.06, subd. 3 states that:

> "the running of the one-year limitation period is suspended during the time a potential charging party and Respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under this chapter, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, ordinance provisions for a civil service or other employment system or a school board sexual harassment or sexual violence policy."

Petitioner filed her written complaint with Respondent's Equal Opportunity division on March 27, 1994. On March 28, 1994, Respondent's Senior Equal Opportunity Consultant, Rebecca Gaspard, acknowledged receipt of Petitioner's complaint in a written memo to Petitioner. In the memo, Ms. Gaspard further informed Petitioner that her case had been assigned to an investigator and that Petitioner would be notified in writing of the results when the investigation was concluded. Finally, Ms. Gaspard encouraged Petitioner to contact the investigator if she experienced any reprisal or negative action for exercising her legal rights.

Petitioner argues that her written internal complaint filed with Respondent's Equal Opportunity division was a "voluntarily engaged in dispute resolution process" as contemplated under Minn. Stat. § 363.06, subd. 3. Therefore, Petitioner maintains that as of March 27, 1994, the running of the one-year limitation period was suspended while her internal complaint was being investigated. With the statute of limitations tolled, Petitioner asserts that her January 23, 1994 sexual harassment claim is not time-barred.

Respondent argues that Petitioner's internal complaint does not qualify as a dispute resolution process under Minn. Stat. § 363.06, subd. 3. According to Respondent, the statute's list of dispute resolution processes which qualify for tolling the time period is exclusive. Respondent cites to the cannon of statutory construction which holds that the express inclusion of one or more things belonging to the same class impliedly excludes all others. Anderson v. Twin City Rapid Transit Co., 84 N.W.2d 593, 599 (Minn. 1957). That is, by listing only "arbitration, conciliation, mediation or grievance procedures" the Legislature was excluding all other types of proceedings from being considered dispute resolution processes. In addition, Respondent maintains that an internal complaint process is not similar enough to the dispute resolution processes listed to be included. Respondent insists that the four dispute resolution examples listed are all structured, formal proceedings with definite beginning and end dates. Whereas, according to Respondent, an internal complaint process is informal with no definite end date. Therefore, Respondent argues that an internal complaint should not be considered a dispute resolution process within the meaning of the statute, and should not suspend the running of the one-year limitation period.

The general rule that express mention of one thing in a statute implies the exclusion of another is merely an auxiliary rule of statutory construction, to be applied with great caution, and not a rule of substantive law. Argo Oil Corp. v. Lathrop, 72 N.W.2d 431 (S.D. 1955). While Respondent cites this general rule in support of its motion, Respondent fails to mention that Minn. Stat. § 363.11 specifically requires that the provisions of the Human Rights Act be construed liberally to achieve the purposes of the Act. In addition, contrary to Respondent's interpretation, the word "including", which precedes the list of dispute resolution examples mentioned in Minn. Stat. § 363.06, subd. 3, is not usually a word of limitation. Rather, the word "including" has the meaning of "in addition to", which suggests that the examples given are simply an illustrative application of the general principle. Black's Law Dictionary 687 (5th ed. 1979); Argo Oil, 72 N.W.2d at 434.

The judge believes that, based on a liberal construction of the provisions of the Act, Petitioner's internal complaint is a voluntarily engaged in dispute resolution process that suspended the running of the one year statute of limitations. It is the intent of the Minn. Stat. § 363.06, subd. 3 to encourage parties to attempt to resolve their disputes by alternative methods. It would be contrary to this expressed intent to penalize Petitioner for attempting to informally resolve her complaint through the use of Respondent's internal process.

In addition, the principles developed by federal courts in Title VII cases are instructive and may be applied when interpreting the Minnesota Human Rights Act. Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. App. 1994). The judge finds it to be significant that Congress recently included in the Civil Rights Act of 1991 a provision encouraging alternative means of dispute resolution, including "settlement negotiations, conciliation, facilitation, mediation, fact-finding minitrials and arbitration", in disputes arising under Title VII and other federal laws affected by the Act. Civil Rights Act of 1991, § 118. Petitioner's filing of a written internal complaint and Respondent's assurance of an investigation is not unlike a conciliation process. Therefore, the judge finds that Petitioner's filing of the internal complaint with Respondent's Equal Opportunity division did toll the running of the statute of limitations from March 27, 1994 until Petitioner was terminated on May 6, 1994. Petitioner's allegation of sexual harassment based on the January 23, 1994 conduct of shift manager Don Moore is not time-barred. Respondent's motion to dismiss Petitioner's January 23, 1994 allegation of sexual harassment as untimely under Minn. Stat. § 363.06, subd. 3, is denied. In so ruling, however, the judge specifically notes that Respondent made no argument with respect to whether the conduct Petitioner alleges to have occurred on January 23, 1994 constitutes actionable sex discrimination under the Act. See, Continental Can Co., Inc., v. State, 297 N.W.2d 241, 249 (Minn. 1980).

Petitioner also argues that once the January 23, 1994 allegation is found to be timely, all of her alleged prior incidents of sexual harassment from 1978 -1991 should be allowed in as part of a continuing violation on the part of Respondent. The doctrine of continuing violation permits a person to recover damages for incidents falling outside the limitations period if those incidents are sufficiently connected to incidents within the limitations period. Bougie v. Sibley Manor, Inc., 504 N.W.2d 493, 497 (Minn. App. 1993). Petitioner has to show that the alleged discriminatory acts indicate a "systemic

repetition of the same policy and constitute a sufficiently integrated pattern to form, in effect, a single discriminatory act." Hubbard v. United Press International, Inc., 330 N.W.2d 428, 441, n. 11 (Minn. 1983).

Respondent argues that, even if the January 23, 1994 incident is allowed in, Petitioner cannot use the continuing violation argument because there was no continuity of employment. Sigurdson v. Isanti County, 448 N.W.2d 62, 67 (Minn. App. 1989). Petitioner was not employed by Respondent from January 1992 through March of 1993. Respondent maintains that this 14 month lapse in employment defeats any claim of a sufficiently integrated pattern. Also, the last incident of offensive conduct alleged in Petitioner's first term of employment occurred in 1990. The earliest incident of offensive conduct alleged in Petitioner's second term of employment occurred on January 23, 1994. Again, Respondent insists that this intervening period of time is too great to allow Petitioner to claim a continuing violation.

The judge agrees with Respondent and finds that Petitioner cannot establish a continuing violation on the part of Respondent. Therefore, all of Petitioner's claims of sexual harassment prior to the January 23, 1994 incident are barred as untimely. Respondent's motion to dismiss as untimely all of Petitioner's claims of sexual harassment based on conduct occurring prior to January 23, 1994, is granted.

Reprisal Claim

To establish a prima facie case of reprisal discrimination, Petitioner must establish that (1) she engaged in statutorily protected conduct; (2) Respondent took an adverse action; and (3) a causal connection exists between the protected conduct and the adverse action. Johnson v. Canadian Pacific Ltd., 522 N.W.2d 386, 391 (Minn. 1994).

Pursuant to Minn. Stat. § 363.03, subd. 1, unfair discriminatory practices may be maintained only against a labor organization, employment agency or employer. Minn. Stat. § 363.03, subd. 7, states that it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person because that person:

> "opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this chapter;..."

Respondent argues that Petitioner's reprisal claim should be dismissed on the ground that her complaint fails to state a claim upon which relief can be granted. Respondent asserts that Petitioner has failed to establish the first element of reprisal discrimination because Petitioner's internal complaint, directed solely at co-worker and shift manager Don Moore, does not qualify as statutorily protected conduct. Respondent cites two recent unpublished Court of Appeals decisions for the proposition that employees cannot base reprisal claims on internal complaints alleging wrongful conduct by a co-worker. According to Respondent, only complaints against employers are statutorily protected.

Petitioner has not addressed this argument.

Respondent makes two separate arguments in support of its motion to dismiss Petitioner's reprisal claim. First, Respondent argues that internal complaints are

insufficient "opposition conduct" based on Guthery v. City of Bloomington, 1990 WL 173853 (Minn. Ct. App. November 13, 1990) (unpublished). Second, Respondent argues that a complaint solely against a co-worker and not the employer does not constitute a violation of the Act under Minn. Stat. § 363.03, subd. 1. Therefore, Respondent maintains that Petitioner has failed to establish that she engaged in statutorily protected conduct. Olchefski v. Star Tribune, 1995 WL 70190 (Minn. Ct. App. February 21, 1995) (unpublished).

Both of Respondent's arguments in support of its motion to dismiss Petitioner's reprisal claim fail. In Guthery, two employees of the Bloomington Police Department, claimed they were subject to reprisal as a result of an internal complaint they made regarding a police officer's treatment of a black prisoner. The court found no basis for the claim and suggested that only a formal charge filed with the Human Rights Department is statutorily protected conduct. The court cited only that portion of the anti-retaliation provision which states that employees who have "filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing" are protected from reprisal. Id. at 2. The court implied that, absent evidence that a charge was filed with the Human Rights Department concerning the officer's treatment of the black prisoner, the internal complaint could not be the basis for a claim of reprisal discrimination. Id.

Such reasoning by the court in Guthery is contrary to numerous other decisions which have found a variety of opposition conduct to be protected by the anti-retaliation provision of Minn. Stat. § 363.03, subd. 7. For example, in Tretter v. Liquipak International, Inc., 356 N.W.2d 713 (Minn. App. 1984), the court held that plaintiff's complaints to her co-worker and interviews with the personnel department alleging sexual harassment were statutorily protected conduct for purposes of a reprisal action, where plaintiff was demoted and terminated shortly after these actions. Id. at 715. Likewise, under similar language in Title VII, courts have found a wide range of legal activities (complaints, letters, speeches, protests) qualify as protected opposition conduct. See, e.g, Hearth v. Metropolitan Transit Com'n, 436 F.Supp 685 (D. Minn. 1977). Therefore, Petitioner's filing of an internal complaint alleging sexual harassment is opposition conduct protected under Minn. Stat. § 363.03, subd. 7.

Respondent's second argument in support of its motion to dismiss Petitioner's reprisal claim also fails. Respondent argues that filing a complaint exclusively against a co-worker is not conduct protected under the Act. Courts have held that complaints directed solely against nonsupervisory employees are insufficient to support claims of discrimination under Title VII. See, e.g., Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991); Flowers v. Rego, 691 F.Supp 177, 179 (E.D. Ark. 1988). That is, in order to be actionable, a complaint must be directed at the unlawful employment practice of an employer, and not an act of discrimination by an individual employee. In the instant case, Petitioner's internal complaint was directed solely against her co-worker Don Moore. Given this, Respondent argues that Petitioner's filing of the internal complaint was not statutorily protected conduct. Therefore, Respondent argues that Petitioner's reprisal claim must fail because Petitioner cannot establish the first element of a prima facie reprisal action.

While it is true that courts have thrown out discrimination charges brought solely against nonsupervisory employees, reprisal charges have been treated differently. In Strickland v. Hillsborough County, 65 FEP 255 (Fla. 1994), the court found that the plaintiff had established a prima facie case of reprisal discrimination based on her discharge shortly after filing an internal complaint accusing a co-worker of sexual harassment. The court explained that although the plaintiff's internal complaint was directed solely against a co-worker and not her employer, the plaintiff need only show that she had a reasonable good faith belief that discrimination existed. Id. at 259. The court eventually dismissed the case based on plaintiff's inability to overcome defendant's rebuttal evidence that plaintiff was fired for poor work performance. Id. at 260.

In Trent v. Valley Electric Assoc., 41 F.3rd 524 (9th Cir. 1994), the court considered whether the sexually harassing conduct of an outside consultant could be imputed to the employer, where the employer fired the plaintiff shortly after she complained about the consultant's conduct. The court below held that the plaintiff had failed to establish that she had engaged in protected conduct because her complaint was directed at the behavior of an outside consultant and not her employer. The Ninth Circuit reversed and remanded. The court stated that it did not need to determine whether the outside consultant functioned as a supervisor because the employee does not have to prove that the employment practice complained of was in fact unlawful. Id. at 526. To establish the first element of a prima facie case of reprisal, the employee need only show that she had a reasonable belief that the employment practice she opposed was prohibited. Id. at 526-527, citing, Hearth, 436 F.Supp at 688-89 (D. Minn. 1977).

Respondent claims that the Minnesota Court of Appeals held in Olchefski that a complaint of discrimination against a co-worker is not protected conduct under the Act. Respondent's reading of Olchefski is incorrect. In Olchefski, an employee was fired shortly after filing an internal complaint alleging that a co-worker had harassed her. While the court noted that "a complaint about the conduct of a co-worker does not in and of itself warrant protection under the statute", the court explained that "reprisal claims survive even if the underlying conduct which the plaintiff opposed was not illegal." Id. at 3. Contrary to Respondent's assertions, the court found that plaintiff's filing of the complaints was protected. However, the court determined that the plaintiff's reprisal claim failed because she was unable to establish a causal connection between the filing of the complaints and her termination. Id. The Court stated that "the proximity of the *protected act* of filing complaints is insufficient without a demonstration that 'but for' the protected activity, Olchefski would not have suffered the adverse employment action." (emphasis added) Id.

In the instant case Respondent's only argument in support of its motion to dismiss Petitioner's reprisal claim is that Petitioner has failed to establish that she engaged in statutorily protected conduct. Unlike Olchefski, Respondent has not made the argument that Petitioner has failed to establish a causal connection between her complaint and her termination. Therefore, with respect to the first element of a prima facie reprisal action, the judge finds that Petitioner's act of filing an internal complaint is opposition conduct protected under the anti-retaliation provision of the Act. The fact

that the internal complaint was directed solely at the conduct of a co-worker does not defeat her claim. As long as Petitioner had a reasonable belief that the co-worker's actions were prohibited, her opposition conduct is protected under the Act. Because Petitioner has established that she did engage in protected conduct, Respondent's motion to dismiss Petitioner's reprisal claim is denied.

P.A.R.